



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: O'Brien's Fire Protection Co., Inc.
File: B-233248
Date: November 3, 1988

DIGEST

1. An amendment to a solicitation which makes clear solicitation requirement is for installation of fire detection system in three rooms, not one, is material and a bidder's failure to acknowledge the solicitation amendment renders the bid nonresponsive; absent such acknowledgment, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amended solicitation.
2. A bidder bears the risk of not receiving invitation for bid amendments unless it is shown that the contracting agency made a deliberate effort to exclude the bidder from competing, or the agency failed to furnish the amendment where the bidder availed itself of every reasonable opportunity to obtain the amendment.

DECISION

O'Brien's Fire Protection Co., Inc. (O'Brien's) protests as improper the rejection of its bid under Invitation for Bids (IFB) No. NE-23-88, issued by the Department of Agriculture. The agency rejected O'Brien's bid because it failed to acknowledge a material amendment.

We dismiss the protest.

The protest submissions show that the subject IFB, issued August 18, 1988, contemplated award of a contract for installing a fire detection and suppression system at the Grey Tower National Historic Landmark, home of the founder of the Forest Service. The IFB included the following bid items:

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Item No. 1 - Design, supply, install, and test a fire detection and Halon 1301 fire suppression system 107 at the Grey Tower National Historic Landmark.

Item No. 2 - Design, supply, install, and test a fire detection and Halon 1301 fire suppression system for the computer room and kitchen area.

Apparently, there was some confusion in interpreting the IFB, particularly Item No. 1; bidders were concerned with whether the system was to be installed in more than one room, since performance time for the installation of the system, the quantity of equipment and materials, and thus cost, would be increased depending on the number of rooms covered by the contract.

To clarify the IFB, Agriculture issued on August 29, Amendment No. 1 which provided:

"This solicitation is amended as follows:

Schedule of Items; Item No. 1 - should read--Fire Suppression System. To be installed in Room 101, 105, and 107, as indicated on Drawing No. 105."

According to Agriculture, it issued Amendment No. 1 because without it, bidders could interpret IFB Item No. 1 as requiring the installation of the system in one room instead of three rooms. O'Brien's failed to acknowledge the amendment, and its bid was rejected. O'Brien's filed an agency-level protest which was denied on October 7. This protest followed.


O'Brien's states it never received, nor did it know of, Amendment No. 1 until the time when its bid was rejected. O'Brien's appears to argue that even if it had known of the amendment, its bid would not have been different because it visited the job site and realized that the system had to be installed to protect the entire area.

The failure to acknowledge a material solicitation amendment renders a bid nonresponsive and, thus, unacceptable. El Greco Painting and General Contractors Co., Inc., B-208125.2, Nov. 30, 1982, 82-2 CPD ¶ 492. The reason for this rule is that, absent such acknowledgment, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amended solicitation. Rockford Acromatic Products Co., B-208437, Aug. 17, 1982, 82-2 CPD ¶ 143.

Here, the amendment was material; it clarified for the bidders the government's specification that the system be installed in three rooms, not just one room. Agriculture indicates that, due to the amendment clarification, more materials and time would be necessary to complete the project, thus increasing the bid prices. In this regard, Agriculture's letter denying O'Brien's agency-level protest states that O'Brien's bid was 37 percent lower than the government's estimate and 18 percent lower than the second low bid, which indicates that O'Brien's bid was based on performing the work in only one room. Although O'Brien's claims its price would not have changed had it known of the amendment, the agency had no way of knowing, absent an acknowledgment, whether O'Brien's was bidding on the installation of the system in one room or three rooms. Thus, O'Brien's would not have been legally obligated to meet the agency's needs as identified in the amended IFB had the agency accepted O'Brien's bid. Accordingly, the agency properly rejected O'Brien's bid as nonresponsive for failure to acknowledge a material solicitation amendment.

In addition, it is well-established that a bidder bears the risk of not receiving IFB amendments unless it is shown that the contracting agency made a deliberate effort to exclude the bidder from competing, or the agency failed to furnish the amendment inadvertently where the bidder availed itself of every reasonable opportunity to obtain the amendment. Southern Technologies, B-228516, Jan. 21, 1988, 67 Comp. Gen. _____, 88-1 CPD ¶ 57. According to Agriculture, its records indicate that the amendment was sent to all bidders including O'Brien's; also, Agriculture advises that it had copies of the solicitation and amendment available in the contracting office. There is no evidence of an attempt by Agriculture deliberately to exclude O'Brien's from the competition, nor is there any evidence that the agency had any notice of O'Brien's nonreceipt of the amendment prior to bid opening.

The protest is dismissed.


Ronald Berger
Associate General Counsel